



Bar Council response to the proposed amendments to criminal Very High Cost Case contracts

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Aid Agency's (LAA's) consultation on the amendments to criminal Very High Cost Case (VHCC) contracts.
2. The Bar Council has been consulted as a contractual Consultative Body in relation to proposed amendments to the 2008 Panel Advocates VHCC contract (the 2008 Contract), the 2010 VHCC contract for self-employed advocates (the 2010 Contract) and the 2013 VHCC contract for self-employed advocates (the 2013 Contract).
3. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
4. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board

VHCC contracts

5. The intended effect of the proposed amendments to the 2008, 2010 and 2013 contracts would be to remove the rates of payment from the body of the contract and to set them out in Statutory Instruments. The rates under the Statutory Instruments would be 30 per cent less than the current contractual payment rates and are intended to apply to both existing and future VHCC contracts.
6. The Government intends to give notice of the proposed amendments and lay Statutory Instruments containing the new payment rates on 4 November 2013. The changes are planned to come into force on 2 December 2013. In other words it is proposed that, following the contractual amendments taking effect on the 2 December 2013, any work done on or after that date will be paid at the new rates.

7. In respect of each of the Contracts, the LAA relies upon specific clauses as entitling it to amend the remuneration payable. Different considerations apply, as are set out below.

The 2008 Contract

8. It is in particular to be noted that the terms of the clauses relied upon as entitling amendment have changed between the 2008 and the 2010 and 2013 Contracts.

9. Clause 25.2 of the 2008 Contract provides:

Ongoing changes – from us

25.2 We may make such amendments to this Contract **as we consider necessary in the circumstances to comply with, or take account of, any UK legislation** or any EU legislation having direct effect, or as a result of any decision of a U.K. court or tribunal, or a decision of the European Court of Human Rights or of the European Court of Justice or any other institution of the European Union, or to comply with the requirements of any regulatory body or tax or similar authority. Such amendments may include (without limitation) changes to payment provisions, imposing controls not previously imposed, and amending procedures in the Contract. [emphasis added]

10. The 2008 Contract was with the Legal Services Commission (LSC) – a statutory corporation established under Part 1 of the *Access to Justice Act 1999*. The amendment clause allowed the LSC to make amendments so as to give effect to UK legislation with which it was required to comply or of which it was required to take account. In other words it could amend as necessary in order to give effect to acts of a third party, namely the UK Parliament. This clause was not intended, nor was it expressed so as, to allow a party to the contract (the LSC or any successor body) to effect a unilateral alteration to the terms of the contract by itself laying a Statutory Instrument before Parliament. Yet, that is precisely what is envisaged by the Ministry of Justice (MOJ), of which the LAA forms part. Accordingly, the Statutory Instrument would not have the effect which it is intended to have. The MOJ and LAA have no contractual power under the 2008 Contract to effect any diminution in the rates of pay to Panel Advocates working under that Contract.

11. Moreover, the reference to “UK legislation” in clause 25.2 was plainly intended to refer only to primary legislation, namely Acts of Parliament, rather than to any of the various species of delegated legislation, including Statutory Instruments.

12. This limitation on the scope of the power to amend was recognised in the redrafting of the amendment clauses in the 2010 and 2013 Contracts. Clause 13.4 in the 2010 and 2013 Contracts contains the identically worded powers of amendment as were set out in clause 25.2 of the 2008 Contract. Clauses 13.2 and 13.3, however, (which were only introduced into the 2010 Contract by amendment in April 2013) go much further. They provide as follows:

Amending the Contract to reflect the Lord Chancellor's legislative changes

13.2 We may amend the Contract to reflect the Lord Chancellor's legislative changes as set out at Clause 13.3.

13.3 The Lord Chancellor's legislative changes include:

- (a) any changes the Lord Chancellor may make to Legal Aid Legislation pursuant to:
 - (i) section 2(3) of the Act (regulations making provision about the payment of remuneration by the Lord Chancellor to persons who provide services under arrangements made by the purposes of Part 1 of the Act);
 - (ii) section 9 of the Act (orders modifying Schedule 1 to the Act);
 - (iii) section 11 of the Act (criteria for qualifying for civil legal services);
 - (iv) section 12 of the Act (determinations);
 - (v) any power to make secondary legislation under Part 1 and 4 of the Act; and
- (b) any changes the Lord Chancellor may make to other legislation, including by way of Statutory Instrument as defined in the Statutory Instruments Act 1946 (as amended), which we reasonably believe requires a change to how Contract Work is undertaken and paid for.

13. These clauses extend the power to amend so as to include the Lord Chancellor's legislative changes pursuant to specifically identified delegated legislation. Had the clause as set out in the 2008 Contract (i.e. clause 25.2, and in the 2010 Contract until it was amended in April 2013 (i.e. the old clause 13.2, now clause 13.4)) been sufficient to cover the present situation there would have been no need for the extensive and careful addition of these new clauses. Doubtless, these amendments were sought because the LAA and MOJ were advised (correctly) that the originally agreed powers of amendment did not allow them to effect the pricing changes that are envisaged through the mechanism that the Government is now seeking to use.

14. Accordingly, any attempt to give effect to the proposed reduction in rates of pay to advocates operating under the 2008 Contract would be a repudiation of that Contract, entitling those advocates to bring that Contract to an end.

The 2010 and 2013 Contracts

15. At this stage, the Bar Council does not seek to argue that the terms of clauses 13.2 and 13.3 of the 2010 and 2013 Contracts do not empower the Government to effect changes to the rates of pay under those Contracts through the mechanism that is proposed to be used. There are, however, consequences that flow from the implementation of such amendments. These are addressed below.

Contractual right to terminate

16. Where there has been an amendment made by the LSC/LAA pursuant to the powers granted to it in the 2008, 2010 and 2013 Contracts, there is an express right vested in the advocate to give notice to terminate the Contract concerned. Such notice may be given at any time following the notice being given of the intended amendment, and takes effect as of the day before the day on which the amendment would otherwise have come into effect.¹

17. The contractual right to terminate following amendment is clear. If the advocate does not wish to accept the amendment, they can walk away from the Contract and all performance of future obligations under it beyond the termination date.

18. Up to the date of termination, work will continue to be done at the existing contract rate and all unpaid work will be required to be paid at that existing rate (that being the advocate's accrued right as at the date of termination).

19. In its response to the first Transforming Legal Aid consultation, the MOJ stated:²

“Even after a 30% reduction VHCCs will remain high value, long duration cases that bring certainty of income for providers, which is important, particularly for self-employed advocates. For that reason, in addition to their professional obligations to clients, we do not consider there is a significant risk that advocates will return briefs or that solicitors will exercise their unilateral right of termination under their VHCC contracts.”

20. This appears to suggest that the MOJ believes that there could be some professional obligation on the part of advocates that either means the advocate has no right to terminate the contract despite the LAA's unilateral amendment, or if they do terminate, that the advocate must continue to work without a contract, and hence with no right to payment at all (reduced rates or otherwise).

21. These are both extraordinary propositions. The contractual right to terminate is clear and there is no professional obligation to a client to continue to work when the basis of instruction has fundamentally changed (as would be the case here). The Bar Standard Board's guidance states as follows:³

¹ Of course, the MOJ has no power to amend the 2008 Contract as proposed and any attempt to implement reductions in the rates of pay under that Contract would entitle the advocate to terminate the Contract at common law.

² Ministry of Justice, *Transforming Legal Aid: Next Steps* (2013), paragraph 367. Available at: https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/consult_view

³ Bar Standards Board, *Guidance on Rules 608, 609 and 610 of the Code of Conduct: Withdrawal from a case and return of Instructions* (2012). Available at: <https://www.barstandardsboard.org.uk/code-guidance/guidance-on-rules-608,-609-and-610-of-the-code-of-conduct/>

The position if the nature of Counsel's remuneration is changed

9. The BSB takes the view that if there is a material change made to the basis of Counsel's remuneration, his original instructions have been withdrawn by the client and substituted by an offer of new instructions on different terms.
22. This means that a significant change in remuneration amounts to a 'withdrawal' of instructions and an offer of instructions on new terms. It is not a 'return' of the brief.
23. Given that these proposed amendments follow a consultation exercise that generated 16,000 responses, the overwhelming majority of which opposed the proposed cuts as unsustainable against a history of persistent cuts to legal aid funding, the assessment by the Government that there is no significant risk that advocates will exercise their right to terminate the contract is wholly misconceived, without evidential foundation and breathtakingly complacent.
24. In an effort to provide evidence in this response of the proportion of advocates who will give notice to terminate if these amendments are implemented, a request was made to the LAA to identify all those who currently hold contracts so that their current views could be ascertained. The LAA has yet to provide this requested information which has hampered the Bar Council's ability to carry out this exercise. The failure to provide this information timeously does raise questions about the LAA's appreciation of what a survey of such views might reveal.
25. To date, the Bar Council has identified a significant number of advocates who currently hold contracts who have stated that, if the proposed amendments are made to their contracts, it is their present intention to give notice to terminate. This includes a number of advocates who are involved in ongoing VHCC trials and a significant number who are in cases that are fixed for trial in January 2014.
26. The consequences of the MOJ pursuing unilateral amendment of existing contracts are likely to prove disastrous, particularly where there is termination of contracts where trials are ongoing. This will result in discharged juries, as well as wasted expenditure on trial processes and in instructing a second team of advocates to redo work that has already been contractually paid for under the original contract. That is to say nothing of the human cost for witnesses, jurors and defendants.
27. The consequences for the significant number of substantial trials due to start in early 2014 are hardly less catastrophic. Substantial periods of court time have been set aside for these trials. These trial dates have been fixed for a considerable time; in a number of cases these fixtures have already been re-arranged from earlier dates many months before. It is likely that these fixtures will have to be aborted. The LAA will have to pay new teams of advocates to redo work that they have already paid the presently instructed advocates to do (assuming that they are able to find advocates willing to sign contracts at these reduced rates). Defendants will have to work from scratch with a new team of advocates familiarising themselves with the complexities of the case. By any objective assessment the damage to the quality of justice before the courts of England and Wales is palpable.

28. If the imperative behind these amendments is saving money, they will achieve precisely the opposite.

29. Implementing the proposed amendments will also mean that the Government is dangerously abrogating its responsibility to provide effective legal representation for those currently undergoing criminal trials or who face trials with imminent start dates. These trials are by virtue of having met the criteria for inclusion in the VHCC scheme the most lengthy, complex and difficult cases.

30. The Bar Council takes the view that the Government needs to think again. In the current economic climate to pursue an unprecedented move to significantly amend the terms of ongoing VHCC contracts is likely to incur substantial and unnecessary extra expenditure and cannot be justified.

Nature of the amendments sought

31. In any event, the Bar Council objects to the manner in which it is proposed to amend the terms of each of the 2008, 2010 and 2013 Contracts. In their present form, the payment rates under each Contract are set out as part of the Contract concerned. The LAA intends not to replace those rates within each Contract with the reduced rates provided for in the proposed Statutory Instruments, but rather to remove from the Contracts any recitation of rates whatsoever and to provide only a reference to the Instrument itself where those reduced rates are to be found. As a matter of construction of each Contract, such an amendment is impermissible. It is neither “necessary...to comply with, or take account of, any UK legislation” (the 2008 Contract) nor does it “reflect the Lord Chancellor’s legislative changes” (the 2010 and 2013 Contracts). What would be contractually permissible⁴ (in accordance with the passages quoted in the previous sentence) would be to substitute within each Contract the reduced rates themselves. This is not an arid point, but one of real substance. The Bar Council is concerned that, if the amendments proceed in the manner currently proposed, the LAA will be able to avoid future consultation over any further changes to payment rates, by making those changes under the same Instrument (by the mechanism of an Amending Order). The Bar Council is not prepared to be shut out from future consultation on the rates of pay for its barrister members in this way (or, indeed, at all).

Bar Council
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⁴ Again, as noted above, the MOJ has no power to amend the 2008 Contract as proposed and any attempt to implement reductions in the rates of pay under that Contract would entitle the advocate to terminate the Contract at common law.